BOOK REVIEWS

THE FINANCIAL ORGANIZATION OF SOCIETY. By HAROLD G. MOULTON. Chicago: THE UNIVERSITY OF CHICAGO PRESS. 1921. pp. xxii, 789.

Despite the title, this is a book very interesting and useful to teachers and students of the law of Negotiable Instruments, and scarcely less so to students and teachers of the law of Private Corporations for the reasons which follow.

Much has been said, one is tempted to say preached, about the need for those, attempting to solve legal problems and usefully to state the results of legal problems already solved, to consider the problems in their social setting, to do which involves an understanding of the commercial, industrial and statual backgrounds out of which such problems emerge. And to this exhortation there has been surprisingly little objection, almost everyone agreeing apparently that it is a thing which should be done, a thing, in fact, which we must do if law is to escape justifiable condemnation for its failure reasonably well to function as one of the forms of social control. But what has been done about it? Surprisingly little, in view of the ability and earnestness with which the thing has been urged. All agree that it ought to be done, yet, search the law books and periodicals as you will, you can find very few attempts to translate this counsel into practice by applying it to particular legal rules. Why is this so? There must be a reason and a very good reason, too, if it is to account for a situation apparently so anomalous. An explanation, which may be at least a partial one, is ventured.

In particular, economists and students of business generally not infrequently complain of the law and of the lawyers for ignoring economic theory and the theory of business practices in dealing with legal problems. There is no question but that, frequently, such is the fact. But suppose that some student of the law should attempt to acquire and to apply such theory to some legal problem, what would his experience be? Doubtless he would start by attempting to look at his legal problem through the eyes of the economist. That means providing himself with the conceptual equipment of the economist. Striving to go about it as most economists have hitherto done, he would spend much time watching the rotatory activity of his own mind as it pondered such abstractions as "value theory" and "theory of distribution," and, as to the material for such recluse gyrations, little time would be spent in the laborious process of collecting and arranging the observable facts as to modern industrial and commercial life. On the contrary, many of the facts would be evolved empirically and not a few of the necessary postulates would have no ground more substantial than emotions, traditions, or habits of thought. Working with this material, the processes of ratiocination may produce no end of economic theory, but, when the student of the law tries to apply this theory to his legal problem, it is not surprising that he commonly finds its applicability all but invisible. This is not intended to mean that the results of the work in economic theory are not, its premises being granted, sound and altogether workmanlike nor even that such results may not be very useful for other purposes. But for his purposes, the student of law too often finds economic theory of remote utility. Besides he sees that the economist goes about solving economic problems much as he has been accustomed to go about solving legal problems. Why should he start with the gratuitous assumptions of the economists rather than with his own and what reasons has

he to believe that his dialectic efforts have less validity than have those of other social "scientists"? When one comes to think about it, one must admit that there is much in all this, but it is not recalled that economists criticizing the law commonly qualify their strictures because of it.

Yes, there is much in it. On the other hand, it must not be overlooked that the law must, in the main, plead guilty to the charge of ignoring economics and the other social sciences. The fact is that, with all our exhortations, the lawyers and the economists are a long, long way apart. Each is far from the common ground upon which they can meet. The lawyer has a long hard road ahead of him. It will take much time and real effort for him to get wholly beyond his metaphysical outlook and method but doubly long and hard is the road ahead of the economist. He must do that and, in addition, go out and collect the facts. That is the thing which will take time, patience and no end of effort. Who knows? It may be that the lawyer will have to try to meet him a little more nearly half way. Certain we may be of one thing. The parallelism of their present, respective courses precludes intersection. Directions must shift and both must move.

All of which leads back to Professor Moulton's book. It is a start in another direction. It may be that it is only a step or, indeed, only a stagger, but it is a start on a different line. It is, of course, not the first or only attempt, but it is notable in its concreteness and it is important because it is one of the few. It makes a beginning along a line which, if followed in economics and in the other social sciences, will lead to our bringing into the realm of possibility, at least, the concrete realization of a sociological, pragmatic, or teleological jurisprudence, for the lack of which the economists are not alone in reproaching us.

Just what is the book's merit? The title discloses its scope. The author has collected a considerable body of facts as to our financial institutions and practices. Then, with a coherence of intellectual curiosity exceeding that of a child running hither and yon for wild flowers (of which one is reminded when viewing the work of those abjuring work in "pure theory" to do the much inferior task of collecting fancy-thrilling masses of unrelated descriptive matter), he has tried to assemble the parts of our national financial structure, first, to see it as a whole and, second, to see how it works as a whole. He does not stop at the *what* of its parts but tries to get at their *how* and their *why*. In a word, he tries to treat the subject functionally. It is no easy task. Usually he succeeds. Frequently, as you go through the book with him, you get illuminating glimpses of our monetary and credit machine as a whole and in operation. Sometimes he and you lose the picture. It is then a mere succession of unrelated details. But it is refreshing, stimulating and adequately compensating to escape with him, whether seldom or often, the sterility of orthodox treatment.

Finally, for but a single example of its concrete interest and utility to students of the law. There is much apparent confusion in the cases as to the additions and qualification which may be attached to the promise of a promissory note without destroying the mercantile character of the instrument. *E. g.*, does the maker's promise in the note to pay taxes on the property covered by the mortgage securing the note affect the commercial status of the instrument?) Much of this confusion may disappear upon a more careful consideration of the exact functions of promissory notes. A functional classification of notes discloses that they are used in, or evidence (among other things) an exchange transaction or a credit transaction. In the former the dominant purpose is liquidation or payment, in the latter, the acquisition of value for use by the borrower and the consequent creation of an obligation to return the value with a reward for the waiting in the form of interest. The purpose of credit transactions may be to get value with which to operate an existing business, or, on the other hand, to

establish or enlarge a business. The author thus distinguishes commercial from investment credit (pp. 124-125, 151-173). Two of the incidental differentiating attributes are: the former is short time, the latter long time; the former is repaid out of current receipts, the latter, out of accumulated profits. There are important differences as to the form of security used. Now the present law of the formal requisites of promissory notes is the product largely of that which shaped itself about the ancient use of bills of exchange in exchange transactions. There an approximation to the fluidity of money was the controlling measure of the instrument's commercial utility. For that purpose a "courier without luggage" was needed. Whence our rules of law as to formal requisites. Long afterwards, there arose the problem of raising large amounts of investment credit for plant establishment, and commercial credit for plant operation. As production was put on a larger scale, the problem was that of raising an ever increasing amount of such credit. It would be passing strange, if a device shaped for one type of transaction should, without modification, meet the needs of such a different type of commercial arrangement. The misfit was more serious in the case of investment credit. Here, indeed, an instrument possessing the attribute of universal commercial acceptability would be desirable because it would thereby more perfectly function as a device for gathering in the stray bits of credit widely scattered in space and in time. But that attribute cannot be obtained to too high a degree without sacrificing the attributes necessary to take care of other considerations which are present in long time credit arrangements and which conflict with considerations as to acceptability or fluidity. For example, security is most important. In the case of these conflicting interests, the tendency has been to mold the formal requisites of a promissory note (bond) in investment credit so as to produce an instrument of maximum utility for the purposes of such credit. The breaking away from the early requirements of simplicity naturally began in dealing with investment credit instruments where the policy of security is most pressing. It is not surprising that these innovations should be carried over to commercial credit instruments (as opposed to instruments of exchange) where the need for security, though less, is present.

The law on this matter is just now in the process of shaping itself. The courts in dealing with the instruments performing this new and distinct function have, in more cases than not, reached a desirable result, because of their instinct of fitness and in spite of their constant effort to do the impossible in their attempt to regiment these and the old cases. Nevertheless, it is desirable to articulate this distinction as to the needs of credit because, by so doing, the results commonly reached by the courts are rendered understandable and because the making of such distinction will tend to minimize contrary holdings as well as to result in symmetrical development of this branch of the law. Instead of one set of settled rules as to formal requisites, we should not be surprised to find a shifting of rules dependent upon whether the function of the particular instrument is that of an instrument of exchange, a commercial credit instrument, or an investment credit instrument.

This particular distinction is not wholly new but a treatment of a subject which makes apparent the practical applicability of such a distinction, and of many others, to current legal problems is new and full of promise. The author's frank avowal of a functional outlook makes his work noteworthy because it helps to mark the beginning of a *rapprochement* of capital importance in the development of the law. The book will be a tool of great utility in the hands of all who are handling commercial law subjects and who are seeking greater realism in method and matter.

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